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Supreme Court of the United States

OCTOBER TERM, 1966

No. 553

MCALLISTER BROTHERS INC.,

Petitioner,

—against—

TANKERS AND TRAMPS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

MELVIN J. TUBLIN
Counsel for Respondent
37 Wall Street
New York, New York 10005

POLES, TUBLIN, PATESTIDES
& STRATAKIS
THEODORE P. DALY
of Counsel

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Statement

The petitioner seeks review of a judgment of the United States Court of Appeals for the Second Circuit (A. 29a),* affirming the decree in favor of the respondent made and entered in the United States District Court for the Southern District of New York. A petition and supplemental petition filed by the petitioner in the Court of Appeals to obtain rehearing "in banc" were denied (A. 31a-33a).

This is an action by the respondent as Owner of the S.S. ATLAS for serious damage which resulted from the grounding of the vessel in Kill Van Kull in New York

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* All references are to petitioner's Appendix.

Harbor on November 24, 1958 while the vessel was being piloted by an employee of the petitioner on a trip from anchorage at Stapleton, Staten Island to Linden, New Jersey. The District Court found that the grounding occurred because the pilot had negligently navigated the ATLAS out of the channel in Kill Van Kull during a period of low visibility in fog (A. 12a). The Court held the petitioner liable for its employee's negligence (A. 18a).

At the time of the grounding, the ATLAS was being assisted by one of the petitioner's tugs. Some minutes before the grounding, during a period of good visibility, another of the petitioner's tugs had been assisting the ATLAS, but the more powerful of the two tugs abandoned the ATLAS to bring one of the petitioner's employees ashore solely for the business purposes of the petitioner (A. 4a). The District Court found that it was customary practice in Kill Van Kull for the employment of two tugs to handle vessels of the ATLAS' size, but concluded that pilot negligence rather than absence of the tug was the proximate cause of the grounding (A. 12a). The respondent paid for the services of the pilot and two tugs furnished by the petitioner (A. 8a).

On the day preceding the grounding, the respondent's agent, Cargo and Tankship Management, Inc., had telephoned the petitioner's tug-dispatcher requesting the petitioner to furnish tugs and a pilot the following morning to assist the ATLAS from anchorage at Stapleton, Staten Island to Linden, New Jersey (A. 6a-7a). No mention or reference to any limitation or exemption of the petitioner from liability for the actions of its pilots or tugs was made in the course of this telephone conversation (A. 22a).

The petitioner admits that the negligence of its pilot-employee caused the grounding of the ATLAS. However, in order to escape liability for its employee's negligence, the petitioner urged that the oral contract, that is, the telephone conversation between the respondent's agent and the petitioner's tug-dispatcher, was subject to a "pilotage clause" purporting to make any pilot furnished by the petitioner the servant of the respondent. The petitioner urged that this exculpatory language was to be found on a form time-receipt which the petitioner employed solely to obtain an acknowledgment from Masters of vessels confirming the length of time its tugs were employed. This form time-receipt is also called a "tug assistance slip" (A. 9a). This exculpatory language also appears on the form of invoice later submitted by the petitioner in billing for the services of the tugs.

The petitioner, contrary to the finding of the Court, states in its petition at pages 3 and 4 that the "pilotage clause" appears in "bold print" on the above-mentioned forms. The District Court found that the exculpatory language was "in small print" appearing at the bottom of each paper, below the Master's signature on the tug assistance slip and below the amounts on the invoice (A. 8a).

The petitioner, in its attempt to absolve itself from liability for its employee's negligence, produced no evidence purporting to be contractual in nature linking the petitioner with the "pilotage clause." The petitioner had performed towing services for the respondent's agent on a few prior occasions using the form of time-receipt and invoice described above. Two of these occasions involved towing services provided by the petitioner for the ATLAS, but there was no evidence concerning any dealings between

the parties with respect to the "pilotage clause" (A. 15a, 25a).

The petitioner also urged that the "tug assistance slip" which was presented to and signed by the Master of the ATLAS upon the completion of the pilotage following the grounding, and the invoice for the towing services performed by the petitioner on that occasion which was later paid by the agent for the respondent, served to absolve the petitioner from liability. The petitioner argued that the signing of the time-receipt and the subsequent payment of the invoice in the amount of $562.17 constituted a "release" or "accord and satisfaction" of the grounding damages which were in excess of a quarter of a million dollars.*

The Trial Court found as fact that:

1. there was no evidence of prior discussions between the parties in which the "pilotage clause" was asserted or any settlement of prior claims based on the "pilotage clause" (A. 16a);

2. nor was there any evidence that the ship's agent was in receipt of any "rate schedule" containing the "pilotage clause" (A. 16a);

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* Subsequent to the filing of the District Court's "Opinion, Findings of Fact and Conclusions of Law" on July 8, 1964, the petitioner moved for re-argument in the District Court asserting, for the first time, that the time-receipt signed by the Master of the ATLAS after the grounding and the invoice paid by the agent for the respondent after the grounding operated as a "release" or "accord and satisfaction" for the damages caused by the grounding. That motion was denied. Prior to the filing of the Opinion of the District Court, the petitioner relied solely upon the alleged "previous dealings" as serving to incorporate the "pilotage clause" in the subsequent oral contract (A. 15a).

3. nor was there any evidence that the ship's agent checked the charges for the tugs as stated in the invoice against any "rate schedule" (A. 17a);

4. nor was there any evidence of an attempt to call the respondent's attention to the "pilotage clause" (A. 17a);

5. nor was there any evidence of any exchange of correspondence relating to the "pilotage clause" (A. 17a);

6. nor was there any evidence attempting to establish any custom that all tugboat companies incorporated the "pilotage clause" in their contracts in the Port of New York (A. 17a).

The petitioner erroneously states at page 5 of its petition that the "rate schedule" was "circulated", but there is no evidence of this and the Trial Court affirmatively found that there was no evidence that the ship's agent was in receipt of the rate schedule containing the pilotage clause (A. 16a).

The District Court affirmatively found that the Master of the ATLAS had signed a time-receipt acknowledging the performance of towing services by the petitioner's tugs during stated times, but had not read the "pilotage clause" which appeared "in small print" below his signature and was not aware of the contents of this "small print" (A. 8a-9a).

On the basis of the evidence, the District Court found that the petitioner had not sustained its burden of proving that the "pilotage clause" was a part of the oral agreement between the parties (A. 17a). The Court of Appeals,

after reviewing the evidence and the applicable law, affirmatively stated that it agreed with the finding of the District Court (A. 24a). The Court of Appeals also agreed that there was no "waiver" of liability by the signing of a mere time-receipt and payment of an invoice subsequent to the grounding (A. 26a).

The respondent had urged that the petitioner's breach of its contract to furnish adequate tug assistance was a proximate concurring cause of the grounding and represented an alternative basis for recovery against the petitioner irrespective of the pilot's negligence or the applicability of the "pilotage clause". The District Court concluded that the customary practice in Kill Van Kull required the petitioner to furnish two tugs, but held that the pilot's negligence rather than the lack of tug assistance was the proximate cause of the grounding. The respondent raised this argument again in the Court of Appeals, but the Court of Appeals upheld the District Court on this holding as well (A. 26a).

Questions Presented

The petitioner in its statement of the "Questions Presented" at pages 2-3 of the petition argues indirectly for a shifting of the burden of proving non-applicability of the "pilotage clause" to the respondent. There is no basis in the facts or law for such argument (A. 17a). The respondent contends that the "Questions Presented" are as follows:

1. Were the Courts below correct in concluding that the petitioner had the burden of proving that a liability exemption provision appearing in small print at the bottom of

non-contractual papers and purporting to free the petitioner from the negligence of its pilot-employee, was a part of the oral pilotage and towing agreement between the parties?

2. Were the Courts below correct in concluding that the petitioner had not factually sustained its burden of proving that the liability exemption provision was a part of the oral pilotage and towing agreement between the parties, particularly where it appeared that the exculpatory provision in such non-contractual papers had never been brought to the attention of the respondent or its agent?

3. Were the Courts below correct in concluding that exculpatory language appearing in small print at the bottom of a form of time-receipt signed by the Master of the ATLAS, after the grounding and in an invoice paid by the agent of the respondent after grounding, did not constitute or effect a "release" or "accord and satisfaction" of the damages arising from the grounding in light of the circumstances in this case, particularly where it affirmatively appeared that the exculpatory language in such non-contractual papers was not brought, and did not come, to the attention of the Master of the vessel and does not appear that such language was ever brought to the attention of the respondent or its agent?

4. Is the decision of the Court of Appeals sustainable on other grounds asserted by the respondent in the Courts below?

Reasons for Denying the Writ

It is respectfully submitted that review by this Court is not warranted.

1. *There is no important question of federal law.*—The petitioner states that there are two law questions of great importance to the business world which should be settled by this Court: One, it is said, involves the scope of review by the United States Court of Appeals when presented with a question of law decided adversely by a District Court. The other, it is said, is the legal effect of prior and subsequent dealings between the parties to a contract where the essentials of a contract are agreed upon orally.

The decisions of the Courts below turn upon the peculiar facts of this case, namely, the particular communications and papers passing between the parties or their agents and employees prior and subsequent to the grounding. These facts are hardly likely to be duplicated in any other case.* It is established practice that where a towing company seeks to avail itself of a release from liability in its engagements with a shipowner, the towing company will almost invariably either enter into a "master contract" with the shipowner covering all pilotage services to be performed by the towing company and expressly providing

* The petition states at page 5: "Without directly passing upon the legal conclusions to be drawn from the stipulated facts in this case, the District Court dismissed the libel [sic], seemingly under the belief that the previously decided cases which he cited laid down the test for the minimum proof required." However, the cases cited by the District Court in which the "pilotage clause" was found to be a part of the towing contract, were expressly cited only for illustration or "comparison" (A. 16a), further indicating the minimum effect as precedent of any "towing contract" case decided upon its own peculiar facts.

for the release from such liability, or enter into an informal contract by an exchange of correspondence specifically bringing the "release from liability" clause to the attention of the shipowner. Petitioner's practice is well described in *Transpacific Carriers Corp.* v. *Tug Ellen F. McAllister,* 209 F. Supp. 870 at page 873 (S. D. N. Y. 1962); rev'd, 336 F. 2d 371, 375 (C. A. 2, 1964).

The decision in the case at bar will have no bearing on any case where the towing company bargains or contracts expressly or by fair implication for the applicability of the "pilotage clause". It will have no bearing on any of the commercial cases to which the "Statute of Frauds" is applicable. Because this decision turned on its peculiar facts, it will have no bearing as precedent on other cases, except, possibly, for purposes of illustration or "comparison".

2. *There is no conflict with decisions of Courts of Appeals of the other circuits.*—The petitioner urges that the decision of the Court of Appeals in this case is in conflict with the decisions in other circuits with respect to the applicability of the standard of appellate review termed the "unless clearly erroneous" doctrine. However, a reading of the opinions of the Courts in the cases cited* by the petitioner, indicates that the decisions in those cases are not in conflict with the decision of the Court of Appeals in this case. The question before the Court of Appeals in this case was simply whether the petitioner had sustained its burden of proving that the "pilotage clause" appearing

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* *Olah* v. *S.S. Jaladurga,* 343 F. 2d 457, 459 (C. A. 4, 1965); *Automatic Devices Co.* v. *Automatic Devices Co. of Pa.,* 292 F. 2d 663 (C. A. 3, 1961); *Green* v. *Bluff Creek Oil Co.,* 287 F. 2d 66 (C. A. 5, 1961).

in papers which did not purport to be a part of any contract was, nonetheless, a part of the oral contract between the parties. The District Court found that the "pilotage clause" was not a part of such contract. This finding would ordinarily be considered a finding of fact, *Williston On Contracts* (Third Edition), Vol. 4, §662, rather than a question of law as was posed in the cases from other circuits cited in the petition.

The Trial Court stated (A. 17a):

> "The burden is upon the respondent McAllister Bros. to establish by a fair preponderance of the credible evidence that the pilotage clause was part of the contract between these parties. *G. Robitzek & Bro. Inc.* v. *Davis,* 296 Fed. 107 (2d Cir. 1923); *The Gulf Maracaibo,* 75 F. Supp. 20 (E. D. N. Y. 1947). It has failed to carry that burden."

The Court of Appeals agreed that the petitioner had not sustained its burden of proof (A. 25a). This was a finding "on the facts".

In any event, a reading of the opinion of the Court of Appeals and the dissenting opinion of Judge Hays, indicates that the Court of Appeals did make a broad and independent review of the legal and factual questions raised by the petitioner, and concluded that the petitioner had not sustained its burden of proving that a "pilotage clause" was a part of the oral agreement between the parties. It affirmatively found that "the district court was justified" in its findings (A. 24a).

The petitioner in the Court below filed a petition for rehearing "in banc", and a supplemental petition for re-

hearing "in banc". Each of said petitions was deemed by the Court below as being a request for reconsideration by the panel which heard the appeal and by the Court "in banc". These petitions together raised the very questions now raised by the petitioner in this Court. Specifically, in the supplemental petition to the Court below, the petitioner raised the question as to the applicable standard of review applied by the panel which decided the case at bar. The petitioner cited to the Court of Appeals the recent case of *Mamiye Bros.* v. *Barber Steamship Lines, Inc.*, 360 F. 2d 774 (C. A. 2, 1966). In the *Mamiye* case, the Court had distinguished between the applicability of the "unless clearly erroneous" doctrine to questions of law and to questions of fact.

The Court of Appeals denied the petitioner's requests for rehearing "in banc", on the ground that no active circuit judge requested that the case be reheard "in banc" (A. 31a, 33a), a denial which presumably would include a refusal by Judge Hays who had dissented from the majority opinion. Apparently, the Court of Appeals concluded that the *Mamiye* case had no bearing on the case at bar where a full review of the law and facts had been made by the Court of Appeals.

3. *The decision below is clearly correct.*—The opinions of the Courts below are well reasoned and based upon sound policy as well as principles clearly and consistently enunciated by the courts. It would be disruptive to sound commercial practice, and contrary to all precedent, to permit one party to a contract to obtain serious and substantial exemption from liability, or to effect a "release" or "accord and satisfaction" of accrued liability, by appending exculpatory language in small print which has not been brought to

the attention of the other party to miscellaneous "form" papers which are not and do not purport to be contractual in nature.

The only "law" relied upon by the petitioner to upset the holding of the decision of the Court of Appeals is to be found in legal texts which, upon perusal, carry a refutation of the petitioner's contention. Petitioner cites at page 8 of the petition, *Williston On Contracts* (Third Edition), Vol. 1, §90a., pages 292-293, which states:

> "The acceptance of a paper which purports to be a contract sufficiently indicates an assent to its terms * * * "

However, none of the papers upon which the petitioner relies "purports to be a contract" but is rather a "mere" time-receipt or invoice.

4. *The decision is sustainable on other grounds asserted by respondent in the Courts below.*—The decision of the Courts below are sustainable on other grounds asserted by the respondent in the District Court and the Court of Appeals. The petitioner had breached its contractual duty of furnishing two tugs for the assistance of the respondent's vessel ATLAS in its passage through Kill Van Kull. But for this breach of duty, there would have been no accident, according to uncontradicted expert testimony in the District Court (A. 11a). Further, this breach of duty by the petitioner cast upon the petitioner the burden of proving that the breach was not the proximate cause of the grounding. *Bisso* v. *Waterways Transportation Company,* 235 F. 2d 741, 746 (C. A. 5, 1956). The petitioner made no attempt to rebut this testimony or to sustain this burden of proof.

CONCLUSION

The petition for the writ should be denied.

Respectfully submitted,

MELVIN J. TUBLIN
Counsel for Respondent
37 Wall Street
New York, New York 10005

POLES, TUBLIN, PATESTIDES
& STRATAKIS
THEODORE P. DALY
of Counsel